Petition

81-977

No.

Office - Supreme Court, U.S.
FILED
NOV 24 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1981

SCHNEIDER TRANSPORT, INC., a Wisconsin corporation,

Petitioner,

v.

DALE CATTANACH, individually and as Secretary of the Wisconsin Department of Transportation, and his agents, employees, successors in office, assistants and all others acting in concert or cooperation with him or at his direction or under his control,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November 23, 1981

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QUESTIONS PRESENTED

1. Whether the Tax Injunction Act, 28 U.S.C. §1341, allows the District Courts to enjoin a state's demands for motor vehicle registration fees, consistent with practice under the Anti-Injunction Act of 1867, 26 U.S.C. §7421, where the claimed "taxes" are patently invalid under the Commerce Clause as based solely on out-of-state mileage travelled by the taxpayer's interstate trucking fleet, and where there are no factual disputes regarding the basis for those fees.

2. Whether the imposition of sanctions for nonpayment of a state tax—specifically, the suspension of a taxpayer's motor vehicle operating privileges by a state as a sanction for non-payment of motor vehicle registration fees—is comprehended within the meaning of "assessment, levy or collection" under the Tax Injunction Act, 28 U.S.C. §1341 and is therefore beyond the injunctive powers of a district court?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 657 F.2d 178 (7th Cir. 1981), and appears in the Appendix hereto (App. 1-13). Several opinions rendered by the District Court for the Eastern District of Wisconsin, which were not reported, appear in the Appendix hereto (App. 15-20, 21-28, 29-33).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 17, 1981 (App. 14). A timely petition for rehearing *en banc* was denied on October 14, 1981 (App. 34-35) and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§1341. Taxes by States.

The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the Courts of such State.

§1343. Civil Rights and Elective Franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

United States Code, Title 26:

§7421. Prohibition of Suits to Restrain Assessment or Collection.

(a) Tax. Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining

the assessment or collection of any tax shall be maintained in any court.

United States Code, Title 42:

§1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case involves a controversy between Schneider Transport, Inc. (Schneider), Petitioner herein, an interstate motor carrier, and the Secretary of the Wisconsin Department of Transportation (DOT) and his agents and employees, Respondents herein, regarding the registration of Schneider's interstate truck and trailer fleet and the determination of registration fees under the International Registration Plan (IRP).

The IRP is an agreement regarding registration of interstate motor carriers having among its basic purposes the promotion and encouragement of proportional registration of vehicles, the implementation of the concept of *one* registration plate for each vehicle, and the granting of reciprocity to proportionally registered vehicles. (Complaint, Ex. A. at 1)

At the time of the filing of the Complaint, 22 states and the Canadian Province of Alberta were signators to the

IRP. (Complaint at 5) District Judge Warren described the IRP and its operation as follows:

> Both Wisconsin and Illinois are members of the International Registration Plan (I.R.P.), under which a trucking company involved in interstate shipping can be registered solely in a "base jurisdiction" in lieu of registration in every member state through which the truck passes. Schneider Transport, Inc., a Wisconsin corporation, pursuant to the IRP chose Illinois as its "base jurisdiction" for 1978. Illinois as the state of registration divides the registration fees between the signatory states on a pro rata basis measured by the percentage of miles the vehicle travels in each signatory state. Upon approval of Schneider Transport's registration application, the State of Illinois forwarded the apportioned registration fee checks to the other IRP member jurisdictions, including a $245,872.60 check to the State of Wisconsin.
>
> In addition to the IRP, each signatory state is free to enter into other reciprocity agreements with non-member states. Under Illinois law, the trucking company with its base in Illinois is not charged by Illinois for miles travelled in non-member states which have such a reciprocal agreement. If Wisconsin had been chosen as the "base jurisdiction" the trucking company would have been charged by Wisconsin *for miles also travelled in non-member states which have reciprocal registration agreements with Wisconsin.* (Emphasis added). (App. 21-22).

Schneider has maintained since 1968 a terminal in Streator, Illinois, which provided the "established place of business" for Schneider's application for Illinois IRP registration, and for the registration by Illinois, after consultation with the Wisconsin DOT, of Schneider's interstate fleet (Complaint at 3-4; Affid. of Ellis Bergman at 2). Judge Warren drew the following conclusions concerning the Streator facility:

> Apparently, plaintiff's office in Illinois qualifies under this broad definition. In its affidavits in support of the motion for a preliminary injunction, plaintiff attests that the facility it has in Streator, Illinois has been there for nine years. The IRP, on the other hand, has been in existence for approximately one year. While it is alleged in the defendant's affidavit that there is little in the way of office business conducted in the Streator facility, there is enough to qualify under the broad definition of base jurisdiction.
>
> The Streator office is not merely a sham established solely to take advantage of a loop hole in the IRP. (App. 17-18)

After having accepted without protest the payment of Schneider's apportioned fees of $245,872.60 based on Schneider's mileage within Wisconsin, the Respondent Cattanach sent a letter dated June 7, 1978 to Schneider stating that "you are improperly using Illinois as a base jurisdiction" under the provisions of the IRP. The letter further stated that "In order to legally continue operating on Wisconsin highways," Schneider must transfer the "base jurisdiction" from Illinois to Wisconsin, "Remit to the Wisconsin Department of Transportation, within 72 hours, the difference of apportionment license fees of $797,711.85" and "apply for and display Wisconsin apportioned license plates for these vehicles." (Complaint at 4, Ex. B at 1-2).

Thereafter, employees of the Wisconsin DOT threatened that if Schneider did not accede to those demands, law enforcement officials would deem the Illinois licenses to be invalid, would deny Schneider the use of Wisconsin highways, and would subject Schneider and its drivers to arrest for non-registration and to the imposition of fines and mandatory registration pursuant to §341.04(3), Wis. Stats. (Complaint at 4-5; Dudek Aff. at 1).

Faced with a threatened shutdown of its interstate operations, Schneider commenced this action in the United States District Court for the Eastern District of Wisconsin, seeking enforcement under 42 U.S.C. §1983 of its rights under the Commerce Clause, Due Process Clause, and Full Faith and Credit Clause of the United States Constitution, with jurisdiction under 28 U.S.C. §§1331 and 1343. The Complaint also made reference to 28 U.S.C. §§2201 and 2202 as authorization for declaratory and injunctive relief. A pendent claim for declaration of Schneider's rights under the IRP was also pleaded. (Complaint, at 1-9).[1]

On June 16, 1978, after a hearing, a temporary restraining order was entered and on July 11, 1978, following a further hearing, a preliminary injunction was entered by the District Court, enjoining the defendants from refusing to recognize the validity of the Illinois registration of

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[1] While the District Court addressed only the pendent claim, it is unnecessary to interpret the IRP to address the federal claims. Nor is any interpretation of the IRP or of any state laws involved in the questions presented by this Petition. While Schneider has asserted a separate claim that it is entitled to register in Illinois as a base jurisdiction under the IRP, the Commerce Clause claim, for example, is unaffected by whether Wisconsin or Illinois is the proper base jurisdiction. Under either interpretation of the IRP, Schneider submits that Wisconsin may not *constitutionally* charge fees for mileage travelled in states such as Indiana or Pennsylvania. Respondents acknowledged, in their principal brief before the Seventh Circuit, that "the appellant's claims that its constitutional rights have been violated do not involve an interpretation of the IRP." (Defendants-Appellee's Brief at 8). Nor are any factual disputes presented in connection with the commerce clause claim—*it is undisputed that Wisconsin was paid its fees based on mileage within Wisconsin, and that the additional fees demanded by Respondents were calculated entirely on the basis of mileage travelled outside of Wisconsin.*

Schneider's interstate truck and trailer fleet (App. 15-20). The parties then moved for summary judgment, and on August 21, 1980, the District Court ordered the preliminary injunction dissolved and Schneider's action dismissed, finding it lacked subject matter jurisdiction in view of "the narrow scope of 28 U.S.C. §2201," the Declaratory Judgment Act (App. 18-20). Schneider appealed the District Court's judgment of dismissal to the United States Court of Appeals for the Seventh Circuit, and filed with the District Court a motion for relief pending appeal. That motion was granted on October 17, 1980 (App. 29-33). In its Memorandum and Order granting that motion, the District Court stated:

> Plaintiff's contention that its complaint states a claim under the Commerce Clause does not appear to be frivolous. The Court recognizes that the issue is one which was not fully discussed and developed in the briefs relating to the motion to dismiss and consequently, was not treated in the Memoradnum ordering dismissal (App. 32).[2]

Schneider's appeal to the Seventh Circuit was predicated in large part on the District Court's failure to have considered the plaintiff's Commerce Clause claim. After the filing of Briefs in the Court of Appeals, but prior to oral argument, this Court decided *Rosewell* v. *LaSalle National Bank*, 101 S.Ct. 1221 (1981), reversing *LaSalle National Bank* v. *Rosewell*, 604 F.2d 520 (7th Cir. 1979), on which the District Court had relied in ruling

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[2] Schneider's briefs on the motions before the District Court had, in fact, raised and argued the Commerce Clause claim, in addition to the pendent claim to which the District Court had devoted its attention.

that the Tax Injunction Act, 28 U.S.C. §1341, did not bar this action. The Seventh Circuit directed the filing of supplemental briefs regarding the applicability of the Act, and in an opinion dated August 17, 1981, affirmed the District Court's dismissal of this action. The sole basis for the holding of the Court of Appeals was a lack of subject matter jurisdiction under 28 U.S.C. §1341. In short, the Seventh Circuit held that the Tax Injunction Act was applicable to this action and that it barred jurisdiction to grant any relief. 657 F.2d 178 (7th Cir. 1981). (App. 1-13). A petition for rehearing and rehearing en banc was timely filed, which petition was denied on October 14, 1981 (App. 34-35).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS FAILS TO RECOGNIZE AND APPLY AN EXCEPTION TO THE TAX INJUNCTION ACT ANALOGOUS TO THAT FOUND TO EXIST BY THIS COURT IN ENOCHS V. WILLIAMS PACKING & NAVIGATION COMPANY, 370 U.S. 1 (1962) WITH REFERENCE TO THE ANTI-INJUNCTION ACT OF 1867, 28 U.S.C. § 7421, AND IN DOING SO LEAVES UNANSWERED SIGNIFICANT AND FUNDAMENTAL QUESTIONS OF CONCERN TO STATE AND LOCAL TAXING AUTHORITIES AND TAXPAYERS.

The Tax Injunction Act, like other statutes barring injunctive and declaratory relief in tax cases, is grounded in part on "congressional recognition of the unique considerations presented by anticipatory tax litigation." *Perez* v. *Ledesma*, 401 U.S. 127, n. 17 (1971) (Brennan, J., concurring in part and dissenting in part). A taxing authority is to be permitted to assess and collect taxes allegedly due without judicial intervention, thereby being assured of prompt collection of its lawful revenue.

Where state taxes are concerned, federal non-interference with tax collection is also rooted in principles of federalism. *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 73 (1976). "[F]ederal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state court." *Perez* v. *Ledesma*, 401 U.S. 127, n.17 (Brennan J., concurring in part and dissenting in part).

When neither of these policies are offended, the rationale for any bar upon injunctive relief is no longer applicable. In prior tax cases, this Court has held that a statutory bar to the grant of injunctive relief need not apply where the bar does not further the statute's underlying policies. Petitioner respectfully submits that the exercise of federal jurisdiction in this case works no harm to the Tax Injunction Act or the policies it embodies.

A. Since "An Exaction In The Guise Of A Tax" Is Involved In This Case, The Dangers To The States' Lawful Revenues Posed By Anticipatory Tax Litigation Are Not Present.

In *Enochs* v. *Williams Packing & Navigation Company*, 370 U.S. 1, 7 (1962), this Court defined a judicially created exception to the Anti-Injunction Act, 26 U.S.C. §7421, consistent with that Act's underlying purpose:

> The manifest purpose of §7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal rights to the disputed sums be determined in a suit for refund. In this manner, the United States is assured of prompt collection of its lawful revenue. Nevertheless, if it is clear that under no circumstances could the government ultimately prevail, the central purpose of the Act is inapplicable and, under the *Nut Margarine* case [*Miller* v. *Standard Nut Margarine Company*, 284 U.S. 498 (1932)], the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation, the exaction is merely in "the guise of a tax." *Id.* 284 U.S. at 509.[8]

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[8] This principle has been recognized by this Court in subsequent cases. *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974); *Alexander* v. *"Americans United," Inc.*, 416 U.S. 752 (1974); *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974); *Laing* v. *United States*, 423 U.S. 161 (1976); *Commissioner* v. *Shapiro*, 424 U.S. 614 (1976).

It has been recognized that §7421 and §1341 address the same concerns, *Perez* v. *Ledesma*, 401 U.S. 82, 127 (Brennan, J., concurring in part and dissenting in part), and the Court has explicitly noted that the statutes were "comparable" and that one statute "throws light on the proper construction to be given" the other. *Enochs* v. *Williams Packing & Navigation Co., supra*, 370 U.S. at 6. Like the text of §1341, the text of §7421 itself contains no exception concerning patently invalid tax demands; however, this Court in *Enochs* v. *Williams Packing* recognized and applied such an exception without difficulty. Thus, the literal language of the Tax Injunction Act does not preclude the recognition of such an exception, any more than did the language of the Anti-Injunction Act. Whether inapplicability of the Act is premised on the thinking that such an exaction is not a "tax" for purposes of the Act, or upon the belief that the purposes underlying the Act are offended rather than furthered by its application in such circumstances are opposite sides of the same coin. Either rationale depends ultimately on the ascertainment of congressional intent: Did Congress intend to deny taxpayers access to the federal courts where federal rights are jeopardized by the taxing authorities' wholly unlawful demands? Noting that such an intent was not found to exist with respect to the Act's analogue, the Anti-Injunction Act of 1867, 26 U.S.C. §7421, Schneider argued the inapplicability of the Tax Injunction Act to this case.

Schneider argued before the Seventh Circuit that under no circumstances could Wisconsin's demands for fees based on out-of-state mileage be reconciled with established Commerce Clause principles sustaining state taxes only when "fairly apportioned." (Brief for Appellant at 25-28; Appellant's Reply Brief at 14-17; Supplemental Reply Brief for Appellant at 12). *Complete Auto Transit, Inc.* v. *Brady*,

430 U.S. 274, 279 (1977).[4] *See Greyhound Lines* v. *Mealey*, 334 U.S. 653 (1948). Based on this contention and the district court's findings that equity jurisdiction otherwise exists, Schneider urged the Court to recognize and apply an exception to §1341 like that applied in *Enochs* v. *Williams Packing*. (Supplemental Reply Brief for Appellant at 9-15).

The Seventh Circuit refused to decide whether §1341 is subject to the exception urged by Schneider, deeming it unnecessary to address that question because:

> "As the facts and the opinion of the District Court indicate, there is substantial dispute over the merits of Schneider's claims." 657 F.2d at 134. (Slip Op. at 11; App. 13).

However, the District Court's opinion granting the motion to dismiss had completely failed to address Schneider's claim for relief under the Commerce Clause and had discussed only Schneider's IRP-based pendent claim (App. 32, see also, *ante* at 7). The Seventh Circuit's opinion indicates that the only area of factual dispute related to the IRP-based claim, not to Schneider's claim that, irrespective of the validity of its Illinois IRP registration, Wisconsin had no power, under the Commerce Clause, to impose registration fees upon Schneider based on mileage travelled by Schneider's fleet outside of Wisconsin. Indeed, footnote 2 to the Seventh Circuit's opinion and the accompanying text illustrate the Court's recognition that Wis-

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[4] The Wisconsin courts have held that motor vehicle registration fees serve the purpose of "raising revenue." *State* v. *Yellow Freight Systems, Inc.*, 96 Wis.2d 484, 489, 292 N.W.2d 361, 364 (Ct. App. 1980) *affirmed* 101 Wis.2d 142, 303 N.W.2d 834 (1981). Thus, such impositions are to be tested by the standards set out in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). *See Commonwealth Edison* v. *Montana*, 49 LW 4957, 4960 n.12 (S.Ct., June 30, 1981).

consin authorities had been paid proportional registration fees based on miles travelled in Wisconsin by Schneider's fleet, and that *the fees at issue in this action were based on miles travelled in non-member jurisdictions, clearly, outside the borders of Wisconsin.* 657 F.2d at 130, n.2; (Slip Op. at 3, n.2; App. 4, n.2). The factual basis for Schneider's Commerce Clause claim was undisputed, as was the legal claim: The Respondents have never attempted to answer Schnedier's claim that the disputed registration fees are not "fairly apportioned." Thus, this case poses none of the problems of anticipatory tax litigation which statutes like §1341 or §7421 were enacted to remedy.

B. Since The "Exaction" Sought Here Is Patently Invalid Under The Commerce Clause, Principles Of Federalism And Congressional Intent Favor The Availability Of Federal Jurisdiction.

Section 1341 also embodies notions of federalism, in addition to a recognition of the problems raised by anticipatory tax litigation. However, the federalism-based concerns which sometimes favor exclusive state jurisdiction are nonexistent in this case; indeed, in light of the circumstances presented here, the policies underlying §1341, as well as its legislative history, support the continued availability of a federal forum. In this regard, it should be noted that Petitioner's argument here based on *Enochs* v. *Williams Packing* is premised solely on its Commerce Clause challenge to the demanded registration fees.

As is made clear in the Tax Injunction Act's legislative history (S. Rep. No. 1035, 75th Cong., First Sess., p. 2-3 (1937); H.R. Rep. 1503, 75th Cong., First Sess., p. 2 (1937)), §1341 was modeled and based upon the Johnson Act of May 14, 1934. 48 Stat. 775, 28 U.S.C. §1342. The Johnson Act deprived federal District Courts of jurisdic-

tion to enjoin the enforcement of rate orders of state and public utility commissions "where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such State." The Act applied only where the rate order did not interfere with interstate commerce. This condition, in addition to the availability of a final appeal to the United States Supreme Court, was considered necessary by Congress to be an adequate safeguard against prejudicial actions by the state courts.

The conclusion that federal jurisdiction should be maintained in the field of interstate commerce, implicit throughout the lengthy Congressional debate, is most clearly seen in arguments as to whether the state courts could be trusted to deal fairly with all constitutional issues. *See, e.g.*, 78 Cong. Rec. 1915-20, 2014-24, 2027-48, 2238-43, 8322-51, 8415-33 (1934). These concerns echo the common recognition that claims that state taxation treads on the free flow of interstate commerce are among those that are most appropriate for the exercise of federal jurisdiction.

> Even judges and commentators ordinarily hesitant about federal judicial intervention into legislative choice tend to support a relatively active role for the federal judiciary "when the centrifugal, isolating or hostile forces of localism are manifested in state legislation." Tribe, *American Constitutional Law* (1978), §6-1, 319 *quoting* Brown, "The Open Economy: Mr. Justice Frankfurter and the Position of the Judiciary," 67 Yale L. J., 219, 220 (1957).

It was precisely to protect against the tendency of such localism to burden the flow of interstate commerce that the Commerce Clause was adopted. *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 533-534 (1949). Local feeling which manifests itself in "parochial legislative policies", *Id.* at 538, may also be brought to bear on elected state judges.

Such concerns about state courts' susceptibility to localism were the focus of Congressional attention at the time of the Johnson Act's enactment. The national economy and a national legal system were recognized as important factors in the prosperity and social progress of the American people:

> Other factors entered into it, of course; but one of the most effective of all stimuli of this progress was the unity and harmony of interpretation of the Constitution obtained by having constitutional questions decided by Federal courts. The delicate balance in the relations between the Federal and State Governments necessary to avoid conflicts between the various sovereignties never could have been maintained if the power now sought to be destroyed had not been in force throughout our history. Various interpretations of the Constitution would have been made by the various courts of the several States with reference to their peculiar and specific domestic problems, and with little regard for the maintenance of an indissoluble Union. 78 Cong. Rec. 2022 (1934) (remarks of Sen. Austin).

This history reveals that both the Johnson Act and the Tax Injunction Act were enacted with an awareness that the Commerce Clause protects values often at odds with local fiscal needs and therefore less likely to find acceptance in state courts.

While Commerce Clause claims do not lie in the exclusive province of the federal courts, federal jurisdiction over Commerce Clause claims should not lightly be withdrawn. "[O]ne in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end." O. Holmes, *Law and the Court,* in Collected Legal Papers, 291, 296 (1920). Since Schneider's claim based on *Enochs* v. *Wil-*

liams Packing relies solely on the asserted invalidity under the Commerce Clause of the disputed fees; because the federal constitutional issue presented in this case involves no questions of state law; and because the dangers of anticipatory tax litigation may be averted by application of the standards prescribed by this Court in *Enochs* v. *Williams Packing*—recognition of a similar exception to §1341 works no harm to the statute's underlying policies and is consistent with prior decisions of this Court.

Petitioner acknowledges that its claims may ultimately be heard in this Court on direct appeal from the state courts. However, relegation of Commerce Clause claims to the state courts, with resort to the federal courts only on appeal to this Court, may at times result in irreparable harm to interstate commerce during the pendency of litigation, precisely one sort of harm which the Commerce Clause was adopted to avoid.

The availability of a federal forum is especially important where, as here, the taxing state has acknowledged, in effect, that its real dispute is with the economic and taxation policies of another state, and that Schneider has been forced by Wisconsin to serve as a proxy or stand-in for the State of Illinois. (Defendants-Appellees' Memorandum in Opposition to Plaintiff-Appellant's Motion for Stay of Mandate at 1-2.) If Wisconsin's taxing authorities seek to force Petitioner to defend the economic policies of Illinois, the dangers of parochialism and localism which made necessary the Commerce Clause most forcefully support the availability of a federal forum.

Recognition and application of the exception urged by Petitioner, and reversal of the Seventh Circuit decision in this case, would work no danger to the policies underlying §1341, nor would they cause confusion or chaos in the ad-

ministration of the federal courts or of state taxation. Federal courts have had more than 20 years' experience with the *Enochs* v. *Williams Packing* exception, and have not been overburdened by such suits, nor have federal revenues been endangered by tax litigation outside of the statutory scheme provided by Congress. *See: Commissioner* v. *Shapiro,* 424 U.S. 614 (1976).

C. The Question Presented Is One Of Substantial Importance To State And Local Taxing Authorities And Taxpayers Alike.

The issue raised by this petition is of great importance to state and local taxpayers and taxing authorities. The new Administration's articulated tax and economic policies serve to heighten the importance of state and local taxation. State and local tax administration can be expected to, and does, for the most part, function fairly, and it is the taxpaying public's recognition of this fact which underlies the consent and voluntary payment necessary to tax administration. However, the exceptional case may arise where a taxing official, in response to mounting fiscal pressures, or through excessive zeal, attempts to exact a patently lawless or unlawful tax. If injunctive relief is unavailable in those rare circumstances, and an exaction is permitted, *the consent of the taxpaying public is undermined* even though the taxpayer may ultimately prevail, after considerable expense and delay.

Where, as here, the "tax" entails a significant burden on a participant in a fiercely competitive interstate industry, the expense and delay involved in vindicating Commerce Clause rights through administrative proceedings and perhaps three tiers of state courts can have serious effects on commerce. Smaller taxpayers, whose resources are outmatched by those of the State, will be forced to

compromise their Commerce Clause rights; larger taxpayers, with the resources to litigate, will achieve a competitive advantage solely because of their ability to challenge and defeat unlawful demands.

Where the tax authority's claim is colorable, governments' needs for revenue are entitled to primacy. However, where tax demands are clearly unlawful, harm to interstate commerce is averted and no legitimate government interest is impeded by recognition of an exception like that found in *Enochs* v. *Williams Packing*. If each of the states is allowed to impose patently unconstitutional burdens on interstate commerce, and to require compliance with its respective revenue-raising scheme while taxpayers litigate "open and shut" cases, the unified national economy as well as individual taxpayers will suffer. Accordingly, whether the federal courts possess jurisdiction to enjoin patently unconstitutional state tax demands, as they are permitted to do under other statutes generally barring anticipatory relief in tax cases, is a timely question of significant importance warranting consideration by this Court.

II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE HOLDING OF THE SECOND CIRCUIT IN WELLS V. MALLOY, 510 F.2d 74 (2nd Cir. 1975), UPON THE QUESTION OF WHETHER THE SUSPENSION OF MOTOR VEHICLE OPERATING PRIVILEGES IS COMPREHENDED WITHIN THE MEANING OF "ASSESSMENT, LEVY OR COLLECTION" UNDER 28 U.S.C. §1341.

The Tax Injunction Act, 28 U.S.C. §1341, prohibits district courts from enjoining, suspending or restraining the "assessment, levy or collection" of a tax imposed under

state law. By its very terms, the Act operates as a limitation upon the *relief* which may be granted by a District Court in state tax cases. In its Briefs to the Seventh Circuit, Petitioner argued that its Complaint sought relief beyond that prohibited by the Tax Injunction Act and that, accordingly, dismissal of the Complaint was not required, even if the Act were found to bar some of the relief sought. (Supplemental Brief for Appellant at 11-15; Supplemental Reply Brief for Appellant at 21-25). Specifically, Petitioner sought to obtain injunctive relief against the imposition of sanctions for nonpayment of the fees sought by Respondents, sanctions in the form of ticketing *en mass* which would subject both Petitioner and its employees to penalties, fines and possible imprisonment. (Complaint at 5, 8-9).

It is clear that in requesting such relief Petitioner did not seek to restrain the "assessment" or "levy" of a tax under state law, as neither an assessment or levy had been made or threatened (although an assessment would have been permitted by §341.405, Wis. Stats.). Thus, the issue before the Seventh Circuit was whether an injunction against the Wisconsin DOT's threatened denial to Schneider of the use of Wisconsin highways—to shut down Schneider's interstate operation through a refusal to recognize Schneider's registration and through *mass* ticketing of its drivers—was a prohibited injunction against the "collection" of a state tax.

In *Wells* v. *Malloy,* 510 F.2d 74 (2nd Cir. 1975), the Court of Appeals for the Second Circuit held that the imposition of coercive sanctions for non-payment of a motor vehicle use tax is not comprehended within the meaning of "collection" under the Act.

> [I]n speaking of "collection," Congress was referring to methods similar to assessment and levy, *e.g.*, dis-

> tress or execution . . . that would produce money or other property directly, rather than indirectly through a more general use of coercive power. 510 F.2d at 77 (citations omitted).

In *Wells,* the unpaid tax arose out of the use of a motor vehicle, and the sanction imposed by Vermont authorities (and enjoined by the Second Circuit) was the suspension of the taxpayer's operating privileges. In the present case, the unpaid taxes are registration fees relating to an entire interstate fleet, and the sanction Petitioner sought to enjoin was the suspension of that fleet's operating privileges.

The conflict between *Wells* and *Schneider Transport* is clear. However, the Seventh Circuit saw no inconsistency between its holding and that of the court in *Wells.*

First, the Seventh Circuit stated that in *Wells,* the taxpayer sought only to enjoin imposition of an unconstitutional sanction for non-payment *of a tax admittedly due.* The court saw the converse situation to exist here; in the District Court, Schneider had challenged the validity of the tax but did not challenge the sanction on an independent constitutional ground. 657 F.2d at 134. (Slip Op. at 11, App. 11). *Wells* cannot be meaningfully distinguished in such a manner, for *the question presented* in both *Wells* and *Schneider Transport is one of statutory interpretation:* Whether the imposition of coercive sanctions for non-payment of a motor vehicle use tax is comprehended within the meaning of "collection." The existence or nature of any challenge to the underlying tax has no bearing on this question of statutory interpretation. *Wells* and *Schneider Transport* are in direct conflict.

The second distinction suggested by the Seventh Circuit was that *Wells* involved an "unusual" sanction, and that the *Wells* decision was therefore inapplicable in this case,

as the panel below knew of no more familiar sanction than ticketing. 657 F.2d at 134. (Slip Op. at 11, App. 12). However, the sanctions imposed herein are no less unusual than that imposed in *Wells;* in substance, they are the same. In *Wells,* the taxpayer's driver's license was to be revoked for non-payment of the motor vehicle use tax; in *Schneider Transport,* the Wisconsin DOT threatened to deem the fleet registration invalid and to ticket vehicles unless demanded registration fees were paid. Indeed, imposition of such sanctions is more unusual in situations such as those involved in *Schneider Transport;* Schneider's fees were disputed, whereas in *Wells,* the taxpayer acknowledged the validity of the tax and still refused payment. Here, the threatened sanction was unusual in its heavy-handedness; the Respondents threatened the shutdown of Schneider's interstate operations within Wisconsin, whereas they conceded in the Seventh Circuit that only the ticketing of a single vehicle would have been necessary to determine the controversy. (Brief for Defendants-Appellees at 34). Finally, Wisconsin's efforts to induce payment were further removed from "collection" than those employed in *Wells;* ticketing also involves the imposition of sanctions on Petitioner's drivers, who are not liable for the registration fees, whereas in *Wells,* sanctions were imposed solely on the offending taxpayer.

Even assuming that the Seventh Circuit was correct in its conclusion that the sanctions involved here were less unusual than those in *Wells,* the distinction suggested is irrelevant to the statutory language being construed. In short, *Wells* and *Schneider Transport* cannot be reconciled. Petitioner respectfully requests that the writ of certiorari be granted to resolve this conflict between the decisions of the Second and Seventh Circuit Courts of Appeal, to

establish the proper interpretation of the Tax Injunction Act, and to define, for the first time by this Court, the scope of the Act's prohibition against relief in the District Courts.

The increasing fiscal role of state and local governments can only increase the number of disputes between local taxing authorities and taxpayers. Questions as to the scope of §1341's restriction on relief in the District Courts have thus recently assumed greater importance to all participants in state and local taxing processes, not merely to the parties to this litigation. Whether §1341 withdraws from the District Courts the ability to enjoin the imposition of *any* or *all* sanctions as means of coercing or inducing the payment of state taxes is a question of significant importance, to taxpayers and to taxing authorities alike, warranting review and clarification by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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November 23, 1981

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 1981, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to John W. Calhoun, Assistant Attorney General, 114 East State Capitol, Madison, Wisconsin 53702, counsel for the Respondents. I further certify that all parties required to be served have been served.

.....

Dennis M. Grzezinski
Milwaukee, Wisconsin 53292
(414) 273-4000
Counsel for Petitioner

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2246

Argued April 16, 1981

SCHNEIDER TRANSPORT, INC., a Wisconsin Corporation,

Plaintiff-Appellant,

v.

Dale CATTANACH, individually and as Secretary of the Wisconsin Department of Transportation, and his agents, employees, successors in office, assistants and all others acting in concert or cooperation with him or at his direction or under his control,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 78 C 374—*Robert W. Warren*, Judge.

Argued April 16, 1981 — Decided August 17, 1981

Before BAUER, *Circuit Judge*, PECK, *Senior Circuit Judge*,* and CUDAHY, *Circuit Judge*.

* The Honorable John W. Peck, Senior Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

BAUER, *Circuit Judge.* Plaintiff-appellant's complaint sought to enjoin the imposition of almost $800,000 in vehicle registration fees sought by the State of Wisconsin. The complaint also sought declaratory relief. The district court dismissed the complaint for lack of subject matter jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201. We affirm, but for a different reason. We hold that appellant's complaint is barred by the Tax Injunction Act, 28 U.S.C. § 1341.

I

Trucking companies in interstate commerce are often regulated by the several states in which they operate. Registering of trucks is a common method of raising revenue and regulating the industry. The result, however, is that every truck carries many registration plates, creating administrative and regulatory problems for the states and the trucking firms. To deal with these problems, the American Association of Motor Vehicle Administrators drafted the International Registration Plan ("IRP"). The purpose of the plan is to "implement the concept of one registration plate for one vehicle" and to apportion fees among states. International Registration Plan (hereinafter "IRP"), Art. I, ¶C. Under the IRP, a trucking company need register its interstate trucks in only one "base jurisdiction." Fees due the other states in which it operates are computed according to a formula based on the miles traveled in each state and on the state's rate formula. IRP, Art. III.

The IRP defines "base jurisdiction" as

> the jurisdiction where the registrant has an established place of business, where mileage is accrued by the fleet and where operational records of such fleet are maintained or can be made available in accordance with the provisions of Article XIV, A(2).

IRP, Art. II, ¶C(1).

Plaintiff-appellant Schneider Transport, Inc. ("Schneider") is a Wisconsin corporation with its principal place of business in Green Bay, Wisconsin. Prior to 1978, Schneider registered its fleet of 1300 trucks and trailers in Wisconsin. Wisconsin ratified the IRP in 1978. Thereafter, Schneider registered its fleet in Illinois, using a facility in Streator, Illinois as its place of business. Schneider alleged in its compaint that its Streator terminal is "an established place of business of Schneider within the meaning of Article II, Section C(1), of the IRP." Plaintiff's Complaint, ¶10.[1] Illinois issued the registration plates and forwarded to the Wisconsin Department of Transportation about $245,000 in proportional registration fees based on the miles traveled by Schneider's fleet in Wisconsin. Had Wisconsin been Schnei-

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[1] Schneider alleged:

> Schneider maintains, and has maintained since 1969, a terminal at 999 E. Morrell Street, Streator, Illinois. Said terminal is located on a plot of land approximately 100 feet wide and 200 feet deep, which has been leased by Schneider on a long-term basis. A mobile home approximately 10 feet wide and 30 feet long, which is owned by Schneider, has been located on that property since 1969. The mobile home is on blocks rather than wheels, and is connected to the local water, sewerage, and electrical utilities. A pay telephone listed in the name of Schneider is located in the mobile home. Schneider employs an employee on a part-time basis to clean and maintain the mobile home. At present, 76 drivers employed by Schneider reside within 125 miles of Streator, and are based out of the Streator terminal. These drivers pick up their bills at the Streator terminal, complete their paperwork at the conclusion of deliveries there, and often spend the night in the mobile home at the conclusion of late night or early morning deliveries. There are 10 to 25 trailers in the terminal yard at most times.

Plaintiff's complaint ¶ 10.

der's base jurisdiction, Schneider would have owed an additional $797,711.85 in fees.[2]

The Wisconsin Department of Transportation conducted an investigation of Schneider. Its officials discovered that the Streator facility was no more than a "driver's room."[3] Schneider's only offices for dispatching, repairs,

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[2] Article II, Paragraph G of the IRP provides that the only base jurisdiction "may include [in calculating the fees due] those miles traveled in non-member jurisdictions which impose no fees for . . . vehicle registration." Official Commentary, IRP, Art II, ¶ G. Illinois law does not charge for these miles; Wisconsin law does.

[3] The facility is a mobile home containing a pay telephone, a soft drink machine, a couch, a table, and chairs. No one employed by Schneider regularly works there except a woman who cleans it weekly and forwards any mail to Green Bay. Affidavit of James A. Crawmer (June 27, 1978).

The official commentary to the IRP states:

> It is not now, and never has been, the intent of the Plan to permit a registrant to use the flexible provisions of this section in changing his base jurisdiction as a device to avoid the payment of registration fees on a 100% mileage basis [see n.2 *supra*].
>
> * * * * * *
>
> Although "an established place of business" is not defined, it is construed to mean:
>
> ". . . a physical structure owned, leased or rented by the fleet registrant the location of which is designated by street number or road location, and which is open during normal business hours, and in which are located:
>
> 1) a telephone or telephones publicly listed in the name of the fleet registrant,
>
> 2) a person or persons conducting the fleet registrant's business, and
>
> 3 the operational records of the fleet (unless such records can be made available in accordance with the provisions of Article XIV.A.2)."

personnel, storage, and administration remained in and around Green Bay. Affidavit of James A. Crawmer (Nov. 19, 1979).

On June 7, 1978, the Wisconsin Secretary of Transportation, defendant-appellee Dale Cattanach, notified Schneider that it was improperly using Illinois as its base jurisdiction. His letter informed Schneider that it must transfer its base jurisdiction to Wisconsin and pay the almost $800,000 in fees within 72 hours. Schneider alleged that the Department threatened enforcement action, "subjecting Schneider and its drivers to the imposition of fines" and other penalties. Plaintiff's Complaint ¶18. The Department admitted that it agreed not to begin enforcement actions until June 15, 1978. Defendants' Answer ¶11.

On June 15, 1978, Schneider filed this action for declaratory and injunctive relief. Schneider alleged federal claims under the interstate commerce, due process, and full faith and credit clauses. It attached a pendent state claim for breach of the IRP.

The district court issued a temporary restraining order on June 16 and a preliminary injunction on July 11. The orders restrained the Secretary of Transportation from collecting any registration fees. On August 21, 1980, however, the court dismissed Schneider's complaint and dissolved its injunction. The court held that it lacked subject matter jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201, because Schneider alleged only federal defenses and no federal claims. The court only commented briefly on the Tax Injunction Act, 18 U.S.C. § 1341. It held that the Act did not bar Schneider's complaint because the Wisconsin "remedies are not necessarily efficient." On October 17, 1980, the district court granted Schneider's motion for a stay pending appeal.

II

The Tax Injunction Act of 1937, 18 U.S.C. § 1341, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

It is well settled that allegations of deprivation of constitutional rights do not render the Act inapplicable. *Huber Pontiac, Inc.* v. *Whitler,* 585 F.2d 817, 819-20 (7th Cir. 1978); *Gray* v. *Morgan,* 371 F.2d 172, 175 (7th Cir. 1966), *cert. denied,* 386 U.S. 1033 (1967). If the Act applies, therefore, this suit must be dismissed. Schneider contests the applicability of the Act on five grounds: (1) that registration fees are not taxes; (2) that the fees imposed under the IRP are not taxes "under state law;" (3) that the remedy under Wisconsin law for refunds of taxes is not "efficient;" (4) that its suit seeks to enjoin a sanction for non-payment; and (5) that its suit is covered by a court-made exception to the Act because it has shown extraordinary irreparable injury and because "under no circumstances" could Wisconsin prevail in this action. We consider each of these contentions.

A

The Act applies to any "tax." Although not denominated as such, the registration fees are imposed for revenue-raising purposes, a characteristic of any tax. *Commercial Credit Corp.* v. *Schneider,* 265 Wis. 264, 61 N.W.2d 499, 501 (1953). The fees are deposited in a segregated fund, the state transportation fund, Wis. Stat. § 25.40, for transportation purposes, including highway construction. Wis. Stat. § 20.395. The revenues from the

fund "are deposited into funds other than the general fund and are available for the purposes for which such funds are created." Wis. Stat. § 20.001(2)(d). Schneider's argument that the fees are "regulatory licensing fees" is belied by these provisions. *See State of Wisconsin* v. *Yellow Freight Systems, Inc.*, 96 Wis. 2d 484, 487-92, 292 N.W.2d 361 (1980), *aff'd.* 101 Wis. 2d 142, 303 N.W.2d 834 (1981) (comparing permit fees, whose purpose is to identify authorized vehicles for regulatory purposes, with registration fees, whose purpose is to raise revenue and to identify vehicles to aid law enforcement). *See also Britton Motor Service* v. *Dammann*, 14 F. Supp. 634, 635 (W.D. Wis. 1936) ("the registration fee . . . is a tax devoted exclusively to highway needs").

B

Schneider claims that the fees are not assessed "under State law" because vehicles registered pursuant to the IRP are exempt from registration in Wisconsin. Wis. Stat. § 341.05(5). However, the International Registration Plan has no independent force of law, but must be adopted by the legislature of each signatory state. Wisconsin has authorized its Secretary of Transportation to "ratify and do all things necessary to effectuate" the IRP. Wis. Stat. § 341.405.[4] Once so adopted, the IRP is enforceable as a Wisconsin statute. *See State of Wisconsin* v. *Yellow Freight Systems, Inc.* Indeed, it is obvious that the exemption from registration in section 341.05(3)

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[4] Wis.Stat. § 341.405(1) provides:

(1) The secretary of transportation, with approval of the governor, shall ratify and do all things necessary to effectuate the international registration plan adopted by the American association of motor vehicle administrators, with such exceptions as are deemed advisable and such changes as are necessary.

was necessary to avoid a conflict with the IRP, which provides that

> Vehicles registered as provided in Section A of this Article shall be deemed fully registered in all jurisdictions where proportionaly registered for any type of movement or operation . . . .

IRP, Art. V, ¶B. Registration under the IRP is in lieu of registration under Wisconsin law. *State of Wisconsin* v. *Yellow Freight Systems, Inc.*, 303 N.W.2d at 839. It is not, as Schneider suggests, an abdication of Wisconsin's authority to tax vehicles subject to the IRP. Supplemental Brief of Appellant at 5 n.2. Indeed, the amount of the registration fees due can be determined only with reference to the Wisconsin registration rate schedules. IRP, Art. III, ¶A.[5] We therefore hold that the tax sought by Wisconsin is imposed "under State law."

C

Schneider also argues that the remedy provided by Wisconsin law is inefficient. Wis. Stat. § 345.08 provides:

> No suit shall be maintained in any court to restrain or delay the collection or payment of the taxes levied or the fees imposed or enacted in chs. 341 to 349. The aggrieved tax payer shall pay the tax or

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[5] Article III, ¶ A provides:

A. The registration fee for apportionable vehicles shall be determined as follows:

1. Divide the in-jurisdiction miles by total miles generated during the preceding year.

2. Determine the total fees required under the laws of each jurisdiction for full registration of each vehicle at the regular annual or applicable fees, or for the unexpired portion of the registration year.

3. Multiply the sum obtained under Paragraph 2 of this section by the quotient obtained under Paragraph 1 of this section.

> fee as and when due and, if paid under protest, may at any time within 90 days from the date of such payment sue the state in an action at law to recover the tax or fee so paid. If it is finally determined that such tax or fee or any part thereof was wrongfully collected for any reason, the department of administration shall issue a warrant on the state treasurer for the amount of such tax or fee so adjudged to have been wrongfully collected and the state treasurer shall pay the same out of the transportation fund. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as were made within the 90-day period preceding the commencement of the action. Such suits shall be commenced as provided in s. 775.01.

Other sections of Wisconsin law provide for appeal. Wis. Stat. §§ 808.03, 809.60, 809.62.

Schneider has not argued that the statutory provision of a tax refund suit is not plain or speedy. Such requirements are not unusual, and have been upheld as plain, speedy, and efficient. *See Rosewell* v. *LaSalle National Bank,* 49 U.S.L.W. 4285 (S. Ct. March 24, 1981). Rather, Schneider argues that the Wisconsin remedy is not efficient because it will be forced to bring a multiplicity of suits and that it will be subjected to unusual hardship. These claims are without merit.

The Supreme Court has held that a tax scheme that required a railroad to raise its constitutional objections in three hundred separate county actions was not efficient. *Georgia Railroad & Banking Co.* v. *Redwine,* 342 U.S. 299, 303 (1952); *cf. Rosewell* v. *LaSalle National Bank,* 49 U.S.L.W. at 4289. Similarly, in *United States Steel Corp.* v. *MultiState Tax Commission,* 367 F. Supp. 107 (S.D.N.Y. 1973), the court held the Tax Injunction

Act inapplicable in a suit by United States Steel to resist an audit ordered by the Multistate Tax Commission. Under the Multistate Tax Compact, the Commission could seek enforcement of its audit order in any of the seventeen signatory states. It was likely that the plaintiff would have to resist in every state because it was questionable "whether those sister states would be bound" by the decision of one state court declaring other States' laws unconstitutional. Finally, plaintiff would have to file a suit in every state to enforce a judgment in its favor. *Id.* at 117.

None of these factors are present here. Only one taxing authority—Wisconsin—seeks to impose taxes. Wisconsin's suit does not depend on the action of any multistate organization or involve more than one taxing authority. *Accord, Georgia Railroad & Banking Co.* v. *Redwine,* 342 U.S. at 303. Schneider does not support its speculation that other states will try to collect additional taxes. The threat of multiple lawsuits here is only speculative and thus insufficient to avoid the Tax Injunction Act.

Schneider also claims undue hardship will result because it will be required to register its vehicles in Wisconsin as a condition of complying with Wisconsin's demand for payment. Such registration would cost Schneider twenty to thirty thousand dollars in administrative expenses in addition to the $800,000 in fees.[6]

The Tax Injunction Act, however, is concerned only with the procedural sufficiency of a state remedy. *Rosewell* v. *LaSalle National Bank,* 49 U.S.L.W. at 4289. Indeed, Schneider's argument that "undue hardship"

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[6] For purposes of a motion to dismiss, we must accept Schneider's allegations as true.

renders a remedy inefficient is drawn from a statement in the *Rosewell* decision which concerned procedural matters. Multiple lawsuits, the Court held, impose an "unusual hardship . . . requiring ineffectual activity or an unnecessary expenditure of time or energy." *Id.* As its reference was to the procedural elements of the remedy, it does not apply to Schneider's complaint that compliance will cost it money. As in *Rosewell,* Schneider's complaint addresses "a more substantive concern. . . . The procedural method for correction of [its] tax bill remains the same," whether Schneider must incur additional expenses or not. *Id.* An economic burden does not affect Schneider's ability to obtain a "full hearing and judicial determination" of its claims. *Id.* at 4288.

Rosewell also conclusively deals with Schneider's intimation that it is unduly burdensome to require it to pay $800,000 to Wisconsin and lose the interest on the money while in litigation. *Rosewell* directly held that the failure to pay interest on tax refunds does not render a remedy "inefficient." *Id.* at 4289. The loss of interest on the funds paid in taxes is just another form of the same complaint. We therefore reject Schneider's contention that its state court remedy is inefficient.

D

Schneider next argues that the Tax Injunction Act is inapplicable because Schneider seeks to enjoin a sanction for non-payment of taxes. Schneider alleged that defendant threatened to begin mass ticketing of its trucks for non-registration, as provided in Wis. Stat. § 341.04. Unlike in *Wells* v. *Malloy,* 510 F.2d 74, 77 (2d Cir. 1975), however, Schneider does not allege that ticketing of unregistered vehicles is "an unusual sanction for non-payment of a tax admittedly due." *See also Mobil Oil Corp.* v. *Tully,* 639 F.2d 912, 918 (2d Cir. 1981).

Schneider is in a contrary situation. It denies the tax is due and does not allege that ticketing unregistered vehicles is unusual. Nor could such a position be seriously argued, as it is probably the most familiar sanction we know. As such, we need not discuss the other distinctions of *Wells* suggested by appellee. *Wells* simply does not apply.[7] *See Huber Pontiac, Inc.* v. *Whitler*, 585 F.2d at 819.

E

Finally, Schneider urges that we apply a court-made exception to the Tax Injunction Act. In *Enochs* v. *Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962), the Supreme Court carved out an exception to the Anti-Injunction Act of 1867, 26 U.S.C. § 7421, which Schneider claims is analogous to the Tax Injunction Act. The Court held:

> The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue. Nevertheless, if it is clear that under no circumstances could the government ultimately prevail, the central purpose of the Act is inapplicable and . . . the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in "the guise of a tax."

Id. at 7 (citation omitted).

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[7] Since Schneider does not seek damages, our decision in *Fulton Market Cold Storage Co.* v. *Cullerton*, 582 F.2d 1071 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979), also does not apply.

Schneider's position must rest on a claim that Wisconsin could prevail "in no circumstances." We cannot accept that claim. As the facts and the opinion of the district court indicate, there is substantial dispute over the merits of Schneider's claims. As such, we need not decide whether the *Williams Packing* exception should apply to the Tax Injunction Act. Even if it did, the circumstances would not justify its application here.

For the above reasons, we hold that the Tax Injunction Act bars plaintiffs suit. The stay entered by the district court is hereby dissolved and the decision of the district court is

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

Opinion by Judge Bauer
JUDGMENT — ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 17, 1981.
Before
Hon. Willaim J. Bauer, Circuit Judge
Hon. John W. Peck, Senior Circuit Judge*
Hon. Richard D. Cudahy, Circuit Judge

SCHNEIDER TRANSPORT, INC., a Wisconsin corporation, Plaintiff-Appellant,
No. 80-2246 vs.

DALE CATTANACH, individually and as Secretary of the Wisconsin Department of Transportation, and his agents, employees, successors in office, assistants and all others acting in concert or cooperation with him or at his direction or under his control, Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 78-C-374
Robert W. Warren, Judge

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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* The Honorable John W. Peck, Senior Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SCHNEIDER TRANSPORT, INC.,
a Wisconsin corporation,
Plaintiff,

vs. Case No. 78-C-374

DALE CATTANACH, individually and
as Secretary of the Wisconsin Department
of Transportation, and his agents,
employees, successors in office,
assistants and all others acting in
concert or cooperation with him or at his
direction or under his control,
Defendant.

DECISION AND ORDER

Plaintiff, Schneider Transport, has filed a motion for a preliminary injunction requesting that the defendant and his agents be enjoined from giving citations to the plaintiff's drivers, arresting the drivers or in any way stopping the flow of plaintiff's trucks through Wisconsin during the pendency of this action.

In its complaint, Schneider alleges jurisdiction under 28 U.S.C. §§ 1331 and 1343, basing its claim for relief under 42 U.S.C. § 1983. Schneider further alleges that the injunctive and declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

In order for a truck to use a state's highways, it must be registered with the state. Plaintiff's complaint contends that its interstate truck fleet is registered in Illinois pur-

suant to the International Registration Plan, under which a trucking company involved in interstate shipping can be registered solely in the "base jurisdiction" in lieu of registration in every member state through which the truck passes. The state of registration divides the registration fees between the signatory states on a pro rata basis measured by the percentage of miles the vehicle travels in each signatory state. Wisconsin has ratified the IRP pursuant to Wis. Stats. § 341.41.

Schneider is seeking declaratory relief to have this Court proclaim the registration of the trucks in Illinois as sufficient. Wisconsin, through Dale Cattanach, as the Secretary of Transportation, has threatened to "ticket" plaintiff's trucks as not having registered the vehicles in Wisconsin in violation of state law. Wisconsin contests the selection of Illinois as the base jurisdiction, presumably because Green Bay, Wisconsin is plaintiff's principal place of business.

The conflict in this case results from the fact that only twenty-three states are presently signatories to the IRP. Under the plan, the fees are apportioned between those member states of the basis of the percentage of mileage traveled in the member state in relation to the total mileage traveled. However, each signatory state is free to enter into other reciprocity agreements with nonmember states, by which registration in one signatory state is recognized and respected in the other signatory state. For example, if Wisconsin and Michigan enter into such a reciprocal agreement, assuming Michigan is not a signatory to the IRP, Michigan would permit trucks registered only in Wisconsin to operate on Michigan roads and Wisconsin would do likewise.

Under Illinois law, the trucking company with its base in Illinois is not charged by Illinois for miles traveled in nonmember states which have such a reciprocal agreement. Wisconsin, however, under its reciprocal agreements, would charge the trucking company for miles traveled in nonmember states, the fees going into the Wisconsin treasury. Under the IRP, however, Wisconsin can only do this if it is the base jurisdiction as so defined in the bylaws of the IRP.

Plaintiff has attached a copy of the registration plan which defines the term "base jurisdiction" under Article II, C(1). The definition reads:

> 'Base Jurisdiction' means, for purposes of fleet registration, the jurisdiction where the registrant has an established place of business, where mileage is accrued by the fleet and where operational records of such fleet are maintained or can be made available in accordance with the provisions of Article XIV, A(2).

Article XIV, A(2) provides:

> In the event that the registrant's operational records are not located in the base jurisdiction and it becomes necessary for the base jurisdiction to send auditors to the place where such records are normally kept, the base jurisdiction may require the registrant to reimburse the base jurisdiction for per diem and travel expense of its auditors incurred in the performance of such audit.

Apparently, plaintiff's office in Illinois qualifies under this broad definition. In its affidavits in support of the motion for a preliminary injunction, the plaintiff attests that the facility it has in Streator, Illinois has been there for nine years. The IRP, on the other hand, has been in existence for one approximately one year. While it is alleged in the defendant's affidavit that there is little in the way of

office business conducted in the Streator facility, there is enough to qualify under the broad definition of base jurisdiction.

The Streator office is not merely a sham established solely to take advantage of a loophole in the IRP. Schneider Trucking does substantial business with several firms in Streator, Illinois and the surrounding area. A docking facility, i.e., anything more substantial than the office Schneider now has, is unnecessary because Schneider is a bulk shipper, shipping a truckload of one shipper's goods rather than the goods of several shippers from several different locations. The present office is therefore sufficient. Schneider employs a full-time "spotter" who handles Schneider's transactions with the local consignors in Streator. The spotter's duties include: driving the vehicles to the shipper's docking facilities, signing the bills of lading, transferring the risk to Schneider Transport, and returning the bills of lading to the Streator office. These functions of the longstanding office apparently qualify the Streator, Illinois facility under the definition of "base jurisdiction" provided in the IRP.

In order to grant this preliminary injunction, however, four prerequisites must be met: (1) Plaintiff has no adequate remedy at law and will be irreparably harmed if the injunction does not issue; (2) the plaintiff has a reasonable likelihood of success on the merits; (3) the granting of the injunction will not disserve the public interest; and (4) the threatened injury to the plaintiff outweighs the injury the injunction may cause the defendant. *Fox Valley Harvestore, Inc.* v. *A.O. Smith Harvestore Products*, 545 F.2d 1096 (7th Cir. 1976). Plaintiff has the burden of persuasion as to all of these prerequisites. *Id.*

Plaintiff, Schneider Transport, Inc., has met the prerequisites for a preliminary injunction in this case.

First, they have no adequate remedy at law and will be irreparably harmed if the injunction does not issue. The remedy at law requires payment to the State of Wisconsin and then suit for a refund. This would involve loss of interest on the $797,711.85 in additional fees claimed to be due. If plaintiff fails to pay these fees, Wisconsin has threatened to close the business down by the imposition of fines, mandatory registration and substantial imprisonment. This action by Wisconsin would also result in a substantial interference with interstate commerce as well as irreparable harm to Schneider. It is alleged that many of the commodities shipped by Schneider are perishable and these will be destroyed if their transit is halted. Schneider also claims that in all likelihood many of their customers would turn elsewhere for service. These customers require a steady flow of goods and if service is temporarily cut off, Schneider fears that several of these customers may never return.

Finally, Schneider fears irreparable harm if Wisconsin prevails and the fees are assessed, because it is possible that other states where Schneider has a large office may try the same remedy. If this does result, this could certainly wreak havoc upon Schneider Transport in terms of costs and multiple litigation.

Second, in light of the definition of "base jurisdiction," the affidavits filed by plaintiff and Wisconsin's ratification of the IRP, plaintiff has shown a reasonable likelihood of success on the merits. This Court is particularly persuaded by the fact that Wisconsin attempted to have the Commissioners of the IRP change the definition of "base jurisdiction" to include principal place of business. This request was denied, indicating the Commissioner's commitment to a somewhat broader definition.

Third, this Court is satisfied that the public interest will not be disserved by this preliminary injunction. The only

loss to Wisconsin if they prevail on the merits of this case, is a delay in payment. In light of the possible effects on interstate commerce, the public interest is clearly not disserved by this injunction.

Fourth, the threatened interference with plaintiff's business in Wisconsin and elsewhere clearly outweighs the interest of Wisconsin. The only harm that Wisconsin may suffer if they prevail is a delay in payment. Schneider will likely suffer disruption of business, loss of revenue and loss of interest on the additional fees they would have to pay Wisconsin. The threatened injury to Schneider clearly outweighs the injury the injunction may cause Wisconsin.

Therefore, it is hereby ordered that the defendant, Dale Cattanach, individually and as secretary of the Wisconsin Department of Transportation, and his agents, employees, successors in office, assistants and all others acting in concert or cooperation with him or at his direction or under his control by and hereby are enjoined from refusing to recognize the validity of the Illinois registration of the plaintiff's interstate truck and trailer fleet and from hindering or attempting to hinder interstate operations of said fleet pending a hearing by this Court on plaintiff's motion for a preliminary injunction and from attempting in any way to recover on its demand for payment of $797,-711.85 in registration fees.

It is further ordered, that defendant, Dale Cattanach, shall forthwith notify all interested parties and enforcement agencies in the State of Wisconsin of the entry of this order and its terms in the most expeditious manner.

So ordered this 11th day of July, 1978, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SCHNEIDER TRANSPORT, INC.,
a Wisconsin corporation,

Plaintiffs,

vs. Case No. 78-C-374

DALE CATTANACH, individually and as Secretary of the Wisconsin Department of Transportation, and his agents, employees, successors in office, assistants and all others acting in concert or cooperation with him or at his direction or under his control,

Defendants.

MEMORANDUM AND ORDER

Generally, in order for a truck to use a state's highways it must be registered with the state. Both Wisconsin and Illinois are members of the International Registration Plan (I.R.P.), under which a trucking company involved in interstate shipping can be registered solely in a "base jurisdiction" in lieu of registration in every member state through which the truck passes. Schneider Transport, Inc., a Wisconsin corporation, pursuant to the IRP chose Illinois as its "base jurisdiction" for 1978. Illinois as the state of registration divides the registration fees between the signatory states on a pro rata basis measured by the percentage of miles the vehicles travels in each signatory state. Upon approval of Schneider Transport's registra-

tion application, the State of Illinois forwarded the apportioned registration fee checks to the other IRP member jurisdictions, including a $245,872.60 check to the State of Wisconsin.

In addition to the IRP, each signatory state is free to enter into other reciprocity agreements with non-member states. Under Illinois law, the trucking company with its base in Illinois is not charged by Illinois for miles traveled in non-member states which have such a reciprocal agreement. If Wisconsin had been chosen as the "base jurisdiction" the trucking company would have been charged by Wisconsin for miles also traveled in non-member states which have reciprocal registration agreements with Wisconsin.

In early June, 1978, the State of Wisconsin informed Schneider Transport that it would refuse to recognize Schneider's Illinois registration plates and that Schneider would have to transfer its base jurisdiction to Wisconsin, obtain Wisconsin registration plates, and pay to Wisconsin approximately $800,000 in registration fees for mileage traveled in states other than Wisconsin.

On June 15, 1978, Schneider Transport, Inc., filed suit against Dale Cattanach, individually and as Secretary of the Wisconsin Department of Transportation seeking both injunctive and declaratory relief. Pursuant to that request, the Court issued a preliminary injunction enjoining the defendants from refusing to recognize the validity of the Illinois registration, from hindering plaintiff in its interstate operation, and from attempting to recover the approximately $800,000 in registration fees demanded. The plaintiff has now moved for summary judgment and requests a permanent injunction plus a finding from the

Court that the plaintiff was entitled to select Illinois as its base jurisdiction and that Wisconsin is not entitled to the increased registration fees demanded. The defendants have responded by filing motions to dismiss for want of jurisdiction, for failure to state a claim upon which relief can be based, and, in the alternative, for summary judgment.

Before addressing the merits of the actual dispute between the parties, it behooves the Court to first respond to the defendants' jurisdictional and procedural queries. The defendants argue that since the plaintiff has proceeded on the basis of two federal question jurisdictional provisions, 28 U.S.C. §§ 1331 and 1343, the plaintiff's cause of action must arise under the Constitution and laws of the United States.

In essence this is a declaratory judgment action in which plaintiff seeks the Court to now enter a permanent injunction based on a declaration of rights in favor of plaintiff. Plaintiff claims that subject matter jurisdiction is based upon a federal question relying on three separate alleged violations of the Constitution by defendant. Plaintiff asserts that defendant's threatened actions will: (1) violate plaintiff's right to due process; (2) interfere with interstate commerce; and (3) transgress the full faith and credit clause of the Constitution. Defendant disputes that his actions will violate the United States Constitution, but argues that the Court need not reach these three claims. Rather, the defendant suggests that even if its actions may violate the Constitution these pending violations cannot be used under the declaratory judgment statute to confer jurisdiction.

In granting a temporary restraining order and then a preliminary injunction in favor of the plaintiff, this Court was and still remains concerned with protecting the inter-

ests of plaintiff. Nevertheless, no matter the underlying merits of plaintiff's claim, if subject matter jurisdiction is lacking this case must be dismissed. *See* Rule 12(b)(3) of the Federal Rules of Civil Procedure.

The gravaman of plaintiff's claim is that it is immune from defendant's proposed actions and defendant's claims for taxation because of the IRP. Plaintiff asserts that defendant's claims are in contravention of the IRP and that its threatened actions will violate the Constitution. Consequently, plaintiff seeks a declaratory judgment under 28 U.S.C. § 2201, and injunctive relief in aid of the judgment pursuant to 28 U.S.C. § 2202, declaring that defendant's planned actions violate the IRP and, as a result, the Constitution. Defendant argues that this Court lacks jurisdiction because the character of the threatened legal action is the measure used. According to defendant's argument, if the threatened legal action could not have been brought in federal court, then the Court lacks jurisdiction over the declaratory judgment action.

Although only in dicta, the Supreme Court has indicated that a federal district court does not have jurisdiction over a declaratory judgment action when the federal issues would only constitute a defense to the threatened state action. *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237 (1952); *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950). *See* C. Wright, Law of Federal Courts § 18 at 71 (3d Ed. 1976). There are several lower court opinions holding that in a declaratory judgment action the test for jurisdiction is whether the federal claim is disclosed on the face of the plaintiff's complaint. *See, e.g., Shareholders Management Co.* v. *Gregory*, 449 F.2d 326 (9th Cir. 1971); *St. Louis Ry.* v. *City of Tyler*, 375 F.2d 938 (5th Cir. 1967); *Regents of New Mexico* v. *Albuquerque Broadcasting Co.*, 158 F.2d 900 (10th Cir.

1947); *Rambusch Decorating Co.* v. *Brotherhood of Painters, Decorators & Paperhangers of America*, 105 F.2d 134 (2d Cir. 1939); *Zaconick* v. *City of Hollywood*, 85 F. Supp. 52 (S.D. Fla. 1949). Several other courts have followed the narrower view looking towards the potential state litigation. *See e.g., Onieda Indian Nation of New York State* v. *County of Oneida, New York*, 414 U.S. 661 (1974) in dicta; *Potomac Passengers Association* v. *Chesapeake & Ohio Ry.*, 520 F.2d 91 (1975); *Allegheny Airlines, Inc.* v. *Pennsylvania Public Utility Commission*, 465 F.2d 237 (3rd Cir. 1972), cert. denied, 410 U.S. 943 (1973); *Bills* v. *Shaw, Hooker & Co.*, 398 F. Supp. 161 (N.D. Calif. 1975). Wright and Miller in their treatise on federal law state that the narrow view is correct. 10 Wright & Miller, Federal Practice & Procedure § 2767 at 849 (1973); *See* C. Wright, Law of Federal Courts § 18 at 71 (3d Ed. 1976).

In this Court's opinion based upon the comments of the Supreme Court, the narrow view is correct and must be applied. The Supreme Court's comments in *Skelly, supra*, clearly support the narrow view:

> To sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because, as in this case, artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act. 339 U.S. at 673-674.

To the same effect, although in somewhat more guarded language, are the Court's statements in *Wycoff, supra:*

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense,

> which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. 344 U.S. at 248-249.

While Congress has the authority to adopt the broader test for declaratory judgment actions, it has declined to do so. In effect the courts following the narrow view have merely held that Congress in the present declaratory judgment act has not extended jurisdiction to the constitutional limit on federal questions. 10 Wright & Miller, *supra*, at 849.

Since this Court is applying the narrow test, it must determine whether the purported federal issues in the threatened state action are only defenses. In addition, if the federal issues are only defenses to the threatened state action, then the Court must consider whether the state is threatening more than legal state action and, if so, whether that is significant.

Plaintiff argues at length that defendant's demand for payment of registration fees is in contravention of the Constitution. Plaintiff offers nothing, however, to show that the state actions threatened by defendant involve federal issues other than federal defenses. Apparently two types of litigation may be commenced by the defendant if the injunction is removed. In litigating the IRP issue, defendant may choose to start litigation by issuing traffic citations for plaintiff's failure to register in Wisconsin or

he may decide to file a tax collection action. In either case, the defendant's state actions would not involve a federal issue other than the purported constitutional defenses of plaintiff Schneider. Accordingly, plaintiff cannot use the declaratory judgment procedure to transform the proposed state litigation into a federal action and, absent other factors, this action must be dismissed.

The plaintiff alleges that the defendant in essence threatens more than legal action. Plaintiff points to the harm caused by the potential traffic citations, claiming such will result in severe damage. There is no dispute that if the injunction is lifted, the plaintiff fails to pay fees, and plaintiff does not register its vehicles in Wisconsin, defendant may order the state to issue traffic citations to commence the enforcement process. According to plaintiff its drivers will only sign the tickets, as required by state law, if they have the approval of plaintiff Schneider. Thus the drivers, plaintiff asserts, must call a supervisor. Plaintiff claims that this ticketing process, which will take about one hour, will cause it severe harm because its business requires timely delivery.

In this Court's opinion, plaintiff has the power to minimize the delay caused by the potential ticketing process. It can simply advise drivers in advance to accept the citation charging non-registration. In any event, the one-hour delay seems minimal at best. Furthermore, while plaintiff is potentially subject to penalties under Wis. Stat. § 341.04, if it chooses not to risk suffering the sanctions it can pay the taxes and sue for a refund. Wis. Stat. 345.08.

The risks and harms plaintiff may suffer if it refuses to acquiesce in defendant's demands are quite real and potentially severe. This Court agrees with plaintiff that the remedies available are such as to nullify the anti-

injunction statute, 28 U.S.C. § 1341,[1] because the remedies are not necessarily efficient. *See Spector Motor Service* v. *O'Connor,* 340 U.S. 604, 605 (1950). *See also, LaSalle National Banks* v. *Rosewell,* 604 F.2d 520, 532 n. 6 (7th Cir. 1979). Overcoming that obstacle, however, does not overcome the lack of subject matter jurisdiction.

In finding that it lacks jurisdiction, this Court is, as mentioned earlier, compelled to dismiss this action. Initially, without the issue having been raised by defendant, the Court presumed that subject matter jurisdiction existed. This assumption was based upon the face of plaintiff's complaint and appeared well-founded at that time. Upon further reflection and research the narrow scope of 28 U.S.C. § 2201 was uncovered. Although this case must be dismissed, the possible merit of plaintiff's case was and still remains significant. Nevertheless, since jurisdiction is lacking the case must be dismissed and the preliminary injunction dissolved.

In light of the foregoing, it is hereby ORDERED that this action be and hereby is DISMISSED. Accordingly, it is further ordered that the preliminary injunction issued on July 11, 1978 be and hereby is DISSOLVED.

SO ORDERED this 21st day of August, 1980, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
United States District Judge

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[1] Section 1341 provides:

The District Court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law *where a plain, speedy and efftcient remedy may be had in the Courts of such State.*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 78-C-374

SCHNEIDER TRANSPORT, INC., a Wisconsin corporation,

Plaintiff,

vs.

DALE CATTANACH, individually and as Secretary of the Wisconsin Department of Transportation, and his agents, employees, successors in office, assistants and all others acting in concert or cooperation with him or at his direction or under his control,

Defendants.

MEMORANDUM AND ORDER
(Entered October 17, 1980)

On August 26, 1980, plaintiff, Schneider Transport, Inc., filed a motion pursuant to Rule 62(c) of the Federal Rules of Civil Procedure seeking the restoration of a preliminary injunction during the pendency of the appeal of this Court's order dissolving the preliminary injunction. The preliminary injunction, which was issued on July 11, 1978, enjoined defendants from refusing to recognize the validity of plaintiff's registration of its trucks in Illinois, from hindering plaintiff in its interstate operation, and from attempting to recover the approximately $800,000.00 in registration fees it demanded from plaintiff. The preliminary injunction was dissolved and the action dismissed

on August 21, 1980 when the Court held it was without jurisdiction to decide the case.

Rule 62(c) of the Federal Rules of Civil Procedure allows parties to seek the preservation of the status quo pending appeal. The rule provides that:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party . . .

While the rule states that courts may act in their discretion in staying injunctions pending appeal, courts generally consider four factors when determining whether a stay should be granted. The factors are: (1) whether the moving party has made a showing of likelihood of success on the merits; (2) whether the moving party has established that unless the stay is granted irreparable harm will result; (3) whether substantial harm will come to other parties if the stay is granted; and (4) whether the granting of the stay would harm the public interest. *Kansas City Royals* v. *Major League Baseball Players Association*, 409 F. Supp. 233 (W.D. Mo. 1976).

The above factors were considered on July 11, 1978, when the Court issued the preliminary injunction. At that time, the Court held that a preliminary injunction was necessary to prevent irreparable harm to the plaintiff. The Court also found that neither the public nor the state would be substantially harmed by the granting of the injunction. When the Court dissolved the injunction on August 26, 1980, it again noted that the risks and harms plaintiff may suffer if it refuses to acquiesce to defendants' demands

are quite real and potentially severe. Nevertheless, the Court felt compelled to dismiss the action for lack of subject matter jurisdiction.

The Court's concern over the possible risks and harms which might result to plaintiff as a consequence of defendants' actions strongly supports plaintiff's argument that it may be irreparably harmed if the stay is not granted. Furthermore, that the Court granted the preliminary injunction in the first place demonstrates its belief that neither the defendants nor the public would be harmed if the state were enjoined pending appeal from acting in the manner contemplated. Consequently, if not for the requirement that a likelihood of success on the merits be shown, the Court would not hesitate in ordering a stay.

Plaintiff contends that there is a strong likelihood that the Seventh Circuit will reverse this Court's decision. The argument is based on two grounds. First, plaintiff contends that the Seventh Circuit will construe the Declaratory Judgment Act differently than this Court does. Second, it contends that the complaint states an independent claim under the Commerce Clause.

In its order of August 21, 1980, this Court recognized that two lines of authority have developed concerning the application of the Declaratory Judgment Act. The first line of authority, which includes references made by the Supreme Court in dicta, supports the proposition that a federal district court does not have jurisdiction over a declaratory judgment action when the federal issues would only constitute a defense to the threatened state action. *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237 (1952); *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950). The second line of authority would determine the jurisdictional question on the basis of

whether a federal claim is disclosed on the face of the plaintiff's complaint. (*See* cases cited in memorandum of August 21, 1980, p. 4). Plaintiff's argument is that the Seventh Circuit is likely to follow the second line of authority rather than the *Skelly-Wycoff* line followed by this Court. However, plaintiff points to no Supreme Court or Seventh Circuit cases to support this contention and fails to support its argument that the Seventh Circuit will not follow the "narrow" approach taken by this Court.

Plaintiff's second major argument is that the August 21, 1980 memorandum ignored the existence of a substantial federal claim which independently establishes jurisdiction in this Court. Specifically, plaintiff alleges that Wisconsin's demand for payment of fees based on mileage traveled by plaintiff's interstate fleet outside of Wisconsin violates the Commerce Clause and deprives it of its constitutionally protected right to engage in interstate commerce.

Plaintiff's contention that its complaint states a claim under the Commerce Clause does not appear to be frivolous. The Court recognizes that the issue is one which was not fully discussed and developed in the briefs relating to the motion to dismiss and, consequently, was not treated in the memorandum ordering dismissal. Accordingly, in light of the Court's concern with the damage that could result to plaintiff if the injunction is dissolved and the possibility that the Seventh Circuit will characterize the complaint differently than this Court did, the Court is of the opinion that a stay of the dissolution of the injunction is in the best interest of justice.

Rule 62(c) of the Federal Rules of Civil Procedure also gives courts the power to set the terms of the bond or other security so as to secure the rights of the adverse

party when a stay is granted. Plaintiff contends that if a bond is required, it should be in the amount of $797,711.85, which is the amount in dispute. The defendant contends that the bond should be at least $3,200,000.00 so as to secure payment of fees which will be due January 1, 1981.

The Court is of the opinion that a bond in the amount of $797,711.85 will preserve defendant's interests. There has been no evidence to support defendant's claim that $3,200,000.00 will be due in fees in 1981, nor has there been any showing that plaintiff might default on those payments if the matter is resolved by the appellate court by that time.

Based on the foregoing, it is hereby ordered that the dissolution of the preliminary injunction granted by this Court in this action be stayed during the pendency of plaintiff's appeal to the Seventh Circuit upon the plaintiff's posting of a bond in the amount of $797,711.85.

SO ORDERED this 17th day of October, 1980, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
United States District Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
October 14, 1981

Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN W. PECK, Senior Circuit Judge*
Hon. RICHARD D. CUDAHY, Circuit Judge

No. 80-2246

SCHNEIDER TRANSPORT, INC., a Wisconsin Corporation,

Plaintiff-Appellant,

vs.

DALE CATTANACH, individually and as Secretary of the Wisconsin Department of Transportation, and his agents, employees, successors in office, assistants and all others acting in concert or cooperation with him or at his direction or under his control,

Defendants-Appellees.

Appeal from the United States District
Court for the Eastern District of Wisconsin.
No. 78 C 374
Robert W. Warren, Judge.

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* The Honorable John W. Peck, Senior Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by the Plaintiff-Appellant Schneider Transport, Inc., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
October 26, 1981
Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. .....
Hon. .....

No. 80-2246

SCHNEIDER TRANSPORT, INC., a Wisconsin Corporation,

Plaintiff-Appellant,

vs.

DALE CATTANACH, individually and as Secretary of the Wisconsin Department of Transportation, and his agents, employees, successors in office, assistants and all others acting in concert or cooperation with him or at his direction or under his control,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 78 C 374
Robert W. Warren, Judge.

On consideration of the "MOTION FOR STAY OF MANDATE" filed herein on October 19, 1981, by counsel for the plaintiff-appellant,

IT IS ORDERED that said motion is hereby GRANTED and the mandate of this court is hereby STAYED to and including November 27, 1981.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
October 30, 1981
Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. .....
Hon. .....

No. 80-2246

SCHNEIDER TRANSPORT, INC., a Wisconsin Corporation,

Plaintiff-Appellant,

vs.

DALE CATTANACH, individually and as Secretary of the Wisconsin Department of Transportation, and his agents, employees, successors in office, assistants and all others acting in concert or cooperation with him or at his direction or under his control,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 78 C 374
Robert W. Warren, Judge.

This matter comes before the court for its consideration upon the "MEMORANDUM IN OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION FOR STAY OF MANDATE" filed herein on October 28, 1981. Treating this memorandum in opposition as a motion to reconsider this court's order of October 26, 1981, granting a stay of mandate,

IT IS ORDERED that said motion to reconsider is hereby DENIED.

Opposition

Office - Supreme Court, U.S.
FILED
DEC 21 1981
ALEXANDER L. STEVAS
CLERK

No. 81-977

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

SCHNEIDER TRANSPORT, INC.,
a Wisconsin corporation,
Petitioner,
v.
DALE CATTANACH, individually and as Secretary of the Wisconsin Department of Transportation, and his agents, employees, successors in office, assistants and all others acting in concert or cooperation with him or at his direction or under his control,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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December 18, 1981

QUESTION PRESENTED

Does the Tax Injunction Act, 28 U.S.C. sec. 1341, prohibit petitioner from seeking injunctive and declaratory relief in federal district court from the payment of nonregulatory truck registration fees imposed by respondents?

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No. 81-977

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

SCHNEIDER TRANSPORT, INC.,
a Wisconsin corporation,
Petitioner,

v.

DALE CATTANACH, individually and as Secretary of the Wisconsin Department of Transportation, and his agents, employees, successors in office, assistants and all others acting in concert or cooperation with him or at his direction or under his control,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF CASE

The District Court for the Eastern District of Wisconsin determined that it did not have jurisdiction under the Declaratory Judgment Act, 28 U.S.C. 2201, because Schneider alleged only federal defenses and no federal claims. The United States Court of Appeals for the Seventh Circuit reached the same result but for a different reason. It held that the Tax Injunction Act, 28 U.S.C. sec. 1341 applied.

Because petitioner's statement of the case tends to confuse rather than to clarify the issue, the Court is referred to the opinion of the Seventh Circuit Court of

Appeals for a statement of the relevant facts (Petitioner's App. at 2-5; *Schneider Transport, Inc. v. Cattanach*, 657 F.2d 128, 138, 141 (1981)).

ARGUMENT

I. Petitioner's Reliance On *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), Is Erroneous And Petitioner Presents No Questions Which Have Not Been Answered By This Court.

A. The Williams Packing exception does not apply.

Petitioner concedes in effect that the remedy provided by sec. 345.08, Wis. Stats., is "plain, speedy and efficient" as required by the Tax Injunction Act of 1937, 28 U.S.C. sec. 1341.

Instead, petitioner places reliance on *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), to provide an exception to the Tax Injunction Act. This reliance is based on equally erroneous self-serving statements that the registration fees sought to be collected by Wisconsin from petitioner are "patently invalid under the commerce clause." (Petitioner's Brief at 13).

The court of appeals correctly disposed of petitioner's argument in the following language:

> Schneider's position must rest on a claim that Wisconsin could prevail "in no circumstance." We cannot accept that claim. As the facts and the opinion of the district court indicate, there is substantial dispute over the merits of Schneider's claims. As such, we need not decide whether *Williams Packing* exception

> should apply to the Tax Injunction Act. Even if it did, the circumstances would not justify its application here.

(Petitioner's App. at 13).

Petitioner started this cause of action for declaratory and injunctive relief on June 15, 1978, and on August 21, 1980, the district court granted respondents' motion to dismiss for want of subject matter jurisdiction. The court determined that because the petitioner's claims, including a claim that respondents' contemplated action in state court would violate the interstate commerce clause, were merely defenses to action contemplated by the respondents in state court, the district court lacked subject matter jurisdiction under the Declaratory Judgment Act, 28 U.S.C. sec. 2201.

On appeal, the court of appeals reached the same result but determined that the Tax Injunction Act, 28 U.S.C. sec. 1341, applied to deprive the district court of jurisdiction. When interpreting the Tax Injunction Act "the court has emphasized a procedural interpretation in defining both the entire phrase and its individual word components." *Rosewell v. LaSalle National Bank,* 101 S.Ct. 1221 (1981). The district court correctly used the similar procedural rationale. *See Perez v. Ledesma,* 401 U.S. 82, 126-28 n. 17 (1971).

> More directly in *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 300-301, ... the Court stated that: "it is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. *In such a suit he may assert his federal rights* and secure a review of them by this

> Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes."

Rosewell, 101 S.Ct. at 1229. *See also, Matthews v. Rodgers*, 284 U.S.521 (1932). It is to be noted that both the *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), and *Matthews* cases involve commerce clause defenses to contemplated state actions for collection of taxes.

Williams Packing and the statute involved are not analogous to the application of the Tax Injunction Act to the present case. The issues in *Williams Packing* and those in the present case are entirely different. Obviously, only federal jurisdiction was involved in *Williams Packing* and the question was whether the plaintiff could bring the action in spite of the provisions of 26 U.S.C. sec. 7421 (1) of the Internal Revenue Code of 1954 which prohibits the restraint of the assessment or collection of any federal taxes. The question presented in the present case is whether the federal court has jurisdiction to prohibit a state action. As long as the remedy provided the taxpayer by state law is "plain, speedy and efficient," the federal court does not have jurisdiction. Any exception to a state law which prohibits enjoining the assessment and collection of state taxes must be determined by the state court, just as the exception to 26 U.S.C. sec. 7421 (a) was determined by the federal court.

B. The circumstances do not justify the application of Williams Packing.

The petitioner's reliance on *Williams Packing* must be based on a claim that respondents could prevail "under no circumstances."

Petitioner's erroneous claim that registration fees, taxed by respondents are "patently invalid under the commerce clause" ignores the substantive issues. While not relevant in this case, a brief statement of the substantive issues is necessary to completely refute petitioner's claim. The substantive issue is whether, under the International Registration Plan (IRP), petitioner's fleet of trucks should be registered in Wisconsin or Illinois.

The purpose of the IRP is to apportion fees among the states and "implement the concept of one registration plate for one vehicle." (Petitioner's App. at 2). The IRP does not interfere with but enhances interstate commerce. The official commentary to the IRP states: "It is not now, and never has been, the intent of the Plan to permit a registrant to use the flexible provisions of this section in changing his base jurisdiction as a devise to avoid the payment of registration fees on a 100% mileage basis." (Petitioner's App. at 4 n. 3).

Not all states are members of the IRP. Some member states, including Wisconsin and Illinois, have "free reciprocity" agreements with non-member states. Illinois does not add miles traveled "free" in non-member states. Wisconsin does. (Petitioner's App. at 4 n. 2). Because under the IRP the fee is based on the percentage of miles traveled, the result is that trucks using Illinois as a base jurisdiction are paying less than 100% of their registration fee based on a percentage of the miles traveled. The following example, where Wisconsin and Illinois are members of the IRP, and Michigan and Indiana are not members, will show the different results.

Under Wisconsin's administration of the IRP, a Wisconsin carrier traveling 25% of its miles in each of

the four states would pay Illinois 25% of the Illinois registration fee and would pay Wisconsin 75% of the Wisconsin fee. On this basis, the Wisconsin carrier would pay for 100% of the miles traveled. This breaks down as follows:

Miles Traveled In:		*Fees Paid*	
Illinois	25%	to Illinois	25% of Illinois fee
Wisconsin	25%	to Wisconsin	75% of Wisconsin fee
Michigan	25%		
Indiana	25%		
	100%		100%

Under Illinois' administration of the IRP, it would not add the miles traveled by Illinois resident carriers in free reciprocity states like Michigan and Indiana to the miles those carriers travel in Illinois. As a result, *the carrier apportioning its fleet under the IRP with Illinois as a base jurisdiction is paying for less than 100% of the miles traveled.* This breaks down as follows:

Miles Traveled In:		*Fees Paid*	
Illinois	25%	to Illinois	25% of Illinois fee
Wisconsin	25%	to Wisconsin	25% of Wisconsin fee
Michigan	25%		
Indiana	25%		
	100%		50%

In other words, under this example the Illinois resident carrier is only paying for 50% of the miles it travels and only a fraction of the registration fees that it should be paying.

Adding the free reciprocity miles to the jurisdiction miles does not violate the interstate commerce clause. It simply insures that 100% of the registration fee — no more or no less — is paid by the carrier.

Respondents claim that Schneider has unlawfully used Illinois as a base jurisdiction under the IRP, that it owed Wisconsin in 1978 an additional $797,711.85 in registration fees, and that it now owes a proportionately additional sum.

The provision for permitting the addition of reciprocity miles to the base jurisdiction miles is attacked by petitioner as violative of the commerce clause. In fact the exact contrary is true. These agreements, the free reciprocity agreement and the IRP, enhance rather than hinder the flow of interstate commerce. It is the condition that permits truckers to pay less than 100% of the registration fee, thereby diminishing the funds available for the repair and maintenance of state highways, that violates the interstate commerce clause.

While Illinois must at some time bear some of the responsibility for this condition, the basic substantive issue for the present is whether Schneider must register its fleet in Wisconsin rather than be permitted to pay less than 100% of its registration fee by establishing a sham "place of business in Illinois." (*See* Petitioner's App. at 4 n. 3, 5). Clearly, the petitioner cannot claim that "under no circumstances" could respondents prevail. The court of appeals correctly decided that even if *Williams Packing* did apply to the Tax Injunction Act, "the circumstances would not justify its application ...." (Petitioner's App. at 13).

Based on the foregoing facts and arguments, as well as the opinions of this Court in *Rosewell*, *Huffman* and *Matthews*, there is no unanswered question concerning the existence of an exception to the Tax Injunction Act, 28 U.S.C. sec. 1341. The only exceptions are those provided in the Act itself, and those exceptions are conceded to be nonexistent. The

remedy provided by the petitioner in state court is plain, speedy and efficient.

The exception to the Tax Injunction Act argued for by petitioner simply does not exist in federal law, and even if it did exist, it would not apply to the circumstances of this case.

II. The Decision Of The Court Of Appeals Is Not In Conflict With *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975).

At the outset, it should be noted that the ticketing process of which petitioner complains did not threaten to "shut down Schneider's interstate operation." (Petitioner's Brief at 19). This contention was disposed of by the district court in its memorandum and order in which the court stated:

> The plaintiff alleges that the defendant in essence threatens more than legal action. Plaintiff points to the harm caused by the potential traffic citations, claiming such will result in severe damage. There is no dispute that if the injunction is lifted, the plaintiff fails to pay fees, and plaintiff does not register its vehicles in Wisconsin, defendant may order the state to issue traffic citations to commence the enforcement process. According to plaintiff its drivers will only sign the tickets, as required by state law, if they have the approval of plaintiff Schneider. Thus the drivers, plaintiff asserts, must call a supervisor. Plaintiff claims that this ticketing process, which will take about one hour, will cause it severe harm because its business requires timely delivery.

> In this Court's opinion, plaintiff has the power to minimize the delay caused by the potential ticketing process. It can simply advise drivers in advance to accept the citation charging non-registration. In any event, the one-hour delay seems minimal at best. Furthermore, while plaintiff is potentially subject to penalties under Wis. Stat. § 341.04, if it chooses not to risk suffering the sanctions it can pay the taxes and sue for a refund. Wis. Stats. 345.08.

(Petitioner's App. at 27).

In addition, the court of appeals clearly distinguished the present case from *Malloy* in the following language:

> Unlike in *Wells v. Malloy,* [citation omitted] however, Schneider does not allege that ticketing of unregistered vehicles is "an unusual sanction for non-payment of a tax admittedly due." [Citation omitted] Schneider is in a contrary situation. It denies the tax is due and does not allege that ticketing unregistered vehicles is unusual. Nor could such a position be seriously argued, as it is probably the most familiar sanction we know.

(Petitioner's App. at 11-12).

Improper vehicle registration in Wisconsin may result in a traffic citation for violation of sec. 341.04, Wis. Stats. The penalty upon conviction is a routine forfeiture and payment of the proper registration fee.

"In addition to imposing the [forfeiture] penalty under par. (a) or (b), the court shall order the offender to make application for registration or reregistration and to pay the required fee." Sec. 341.04(3) (c), Wis. Stats.

Traffic citations for improper registration of corporate vehicles are issued against the corporate owner of the vehicles. A statutory statement of this enforcement policy is found in sec. 348.20, Wis. Stats. The individual driver is not responsible for the forefeiture or the registration fee. The individual driver's vehicle operating record is not affected. In Wisconsin, a conviction for improper vehicle registration does not even affect the owner's operating record. *See* section TRANS 101.02(22) (c) and (d), Wis. Adm. Code.

In any event, issuance of a traffic citation for improper vehicle registration is only the most direct and routine method to collect vehicle registration fees. Some others may include suspension of the vehicle registration under sec. 341.63, Wis. Stats., until the reason for suspension has been removed, or an action in Wisconsin courts by the Wisconsin Secretary of Transportation under sec. 345.07 Wis. Stats.

Cases dealing with the application of 28 U.S.C. sec. 1341 and the Anti-Injunction Act, 26 U.S.C. sec. 7421(a), are collected in Annotation, Construction and Application of Federal Statute (28 U.S.C. sec. 1341) Prohibiting Federal District Courts From Interfering With Assessment, Levy, or Collection of State Taxes, 17 L.Ed. 2d 1026 and in Annotation, Supreme Court's Construction and Application of Anti-Injunction Act (26 U S.C.S. sec. 7421(a)) Prohibiting Suits to Restrain Assessment or Collection of Federal Taxes, 46 L.Ed.2d 932, respectively.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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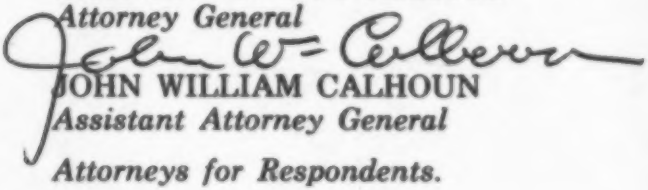

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December 18, 1981

Petitioner's Reply Brief

81-977

No. ~~81-997~~

Office-Supreme Court, U.S.
FILED
DEC 30 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

SCHNEIDER TRANSPORT, INC., a Wisconsin corporation,
Petitioner,

v.

DALE CATTANACH, individually and as Secretary of the Wisconsin Department of Transportation, and his agents, employees, successors in office, assistants and all others acting in concert or cooperation with him or at his direction or under his control,

Respondents.

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I. THE QUESTION PRESENTED BY THIS CASE IS WHETHER FEDERAL COURTS HAVE JURISDICTION TO ENJOIN A PATENTLY INVALID STATE TAX.

In an effort to cloud or obscure the squarely presented issues in this case, Respondents raise several questions which this case does not involve, although doing so in a fashion which suggests that these issues are presented by

the Petition for Certiorari filed by Schneider Transport, Inc. ("Schneider").

First, the Respondents flatly claim that "[t]he question presented in this case is whether the federal court had jurisdiction to prohibit a state [court] action." Brief in Opposition at 4. In fact, had Respondents attempted to resolve this dispute by commencing a state court declaratory judgment action, this litigation in the federal courts would never have arisen. Indeed, it was the Respondents' refusal to resolve their dispute with Schneider in an orderly fashion in Wisconsin's courts, and their threat of a statewide shutdown, which prompted the initiation of this action.

Second, Respondents suggest that this case involves a determination whether there exists "any exception to a state law which prohibits enjoining the assessment and collection of state taxes." Brief in Opposition at 4. If this question is indeed presented, it is only in *the Respondents'* extravagant *claim that state law is dispositive of federal courts' jurisdiction.* Only the Congress, U.S. Const. Art. III, § 1, and this Court, e.g. *Fair Assessment in Real Estate Assn., Inc.* v. *McNary,* 50 L.W. 4017 (December 1, 1981), can prescribe federal jurisdiction. The scope of federal jurisdiction, at issue in this case, is unaffected by the acts of state legislatures.

Finally, the Respondents claim that "[t]he substantive issue is whether, under the International Registration Plan (IRP), [Schneider's] fleet of trucks should be registered in Wisconsin or Illinois." Brief in Opposition at 5. Yet in the same breath, such a claim is dismissed by Respondents themselves as "not relevant." Brief in Opposition at 5. Moreover, it has been repudiated previously by Respondents as well: "[Schneider's] claims that its con-

stitutional rights have been violated do not involve an interpretation of the IRP." (Respondents-Appellees' Brief at 8, Case No. 80-246, United States Court of Appeals for the Seventh Circuit). As explained in the Petition for Certiorari, *Schneider's claim of facial invalidity under the Commerce Clause is unaffected by whether Wisconsin or Illinois is the proper base jurisdiction under the IRP for Schneider's fleet.* Petition for Certiorari at 6 n.1.

When all the unfounded assertions are stripped away, the question presented by this Petition remains as it was originally stated:

> Whether the Tax Injunction Act, 28 U.S.C. §1341, allows the District Courts to enjoin a state's demands for motor vehicle registration fees, consistent with practice under the Anti-Injunction Act of 1867, 26 U.S.C. §7421, where the claimed "taxes" are patently invalid under the Commerce Clause as based solely on out-of-state mileage travelled by the taxpayer's interstate trucking fleet, and where there are no factual disputes regarding the basis for those fees.

II. RESPONDENTS' ATTEMPT TO IMPOSE THE DISPUTED REGISTRATION FEES IS FACIALLY INVALID UNDER THE COMMERCE CLAUSE.

Whether Wisconsin's plan of mileage apportionment is consistent with the IRP and its intent, and Illinois' plan is inconsistent, is not at issue in this case. Respondents' presentation, at pp. 5-7 of the Brief in Opposition is, however, invaluable for its demonstration that *the disputed fees are explicitly based on mileage travelled by Schneider's fleet outside Wisconsin, the taxing state.*

Prior to entering the IRP, Wisconsin simply assessed a per vehicle registration fee, without any indication that any portion of the fee was based on out-of-state activities or was unrelated to in-state services. Demonstrating that

any such specific fee was an unreasonable burden on interstate commerce thus would have involved very difficult, if not impossible, proof problems for a taxpayer. *Under the IRP, however, Wisconsin adopted an explicit fee apportionment scheme which established fees on the basis of mileage travelled in various jurisdictions.* For registration fee purposes, interstate operations were divided into three categories—mileage travelled in the IRP base jurisdiction, mileage travelled in other IRP jurisdictions, and mileage travelled in non-IRP reciprocity jurisdictions. The explicitness of this scheme eliminated the evidentiary problems by making clear Wisconsin's attempt to assess fees for mileage travelled in other states, rendering those claims facially invalid.

Under Respondents' example, the contested fees are those attributable to miles travelled by Schneider's fleet in Michigan and Indiana. Throughout this litigation, Schneider has contended, and the Respondents have never disputed, that Wisconsin has thus " 'undertake(n) to tax . . . interstate activities carried on outside the state's borders,' " *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 282 (1977) quoting *Memphis Gas Co.* v. *Stone*, 335 U.S. 80, 97 (1948) (Rutledge, J., concurring). The disputed fees are thus not "fairly apportioned" and are therefore incapable of withstanding a Commerce Clause challenge.[1] *The fees are invalid on their face, and for the reasons stated in the Petition for Certiorari, federal district courts are not prohibited from enjoining their imposition.*

---

[1] Schneider maintains, and Respondents do not deny, that Schneider has paid to Wisconsin that portion of the registration fee which Respondents apportion to the mileage travelled by Schneider's fleet in Wisconsin. *See Schneider Transport, Inc.* v. *Cattanach*, 657 F.2d 128, 130 (7th Cir. 1981); Petitioner's App. at 3.

III. THIS COURT'S DECISION IN FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION V. McNARY, 50 L.W. 4017 (December 1, 1981) FAVORS REVIEW IN THIS CASE.

The Brief in Opposition, dated December 18, 1981, does not refer to this Court's recent decision in *Fair Assessment in Real Estate Association, Inc.* v. *McNary*, 50 L.W. 4017 (December 1, 1981). In *McNary, supra*, as in the foreshadowing decision in *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503 (1981), state taxpayers brought an action in federal court under 42 U.S.C. § 1983 to redress the allegedly unconstitutional overassessment of real property. In both cases this Court held that federal relief was unavailable. In *McNary, supra*, damages claims were barred for the reason that " '[a]llowance of such claims would result in this Court being a source of appellate review of all state property tax classifications.' " *Id*, 50 L.W. at 4021, *quoting* 478 F. Supp. 1231, 1234 (E.D. Mo. 1979). This reasoning echoed the *Rosewell* Court's concern:

> "The property tax is especially vulnerable to criticism over its administration. Unlike state income or sales taxes that usually can be calculated automatically from the taxpayer's income or the price of a good or service, the property tax is levied on the value of real estate. This element necessarily introduces a degree of subjective individualized judgment by the assessor that would understandably give rise to frequent taxpayer challenges and place pressure on the appellate review procedures."
>
> *Rosewell* v. *LaSalle National Bank*, 450 U.S. at 520 n.26.

Thus, in Sec. 1983 challenges to state tax assessment practices, it is the very nature of the review required which raises the concerns warranting federal noninterference. The "generally complex" "procedures for mass

assessment and collection of state taxes" often give rise to unresolved questions of state law. *Perez* v. *Ledesma*, 401 U.S. 82, 128-129, n. 17 (1971) (Brennan, J., concurring and dissenting). Such questions, as well as underlying claims of erroneous valuation, are clearly inappropriate for federal court resolution. *However, when a Sec. 1983 suit alleges the facial invalidity of a state tax, the issue becomes solely a question of federal law.* Factors which favor federal court restraint diminish and, where the challenge is colorable, are offset by countervailing federal values.

Thus, the Court's opinion in *McNary* specifically left undecided the question whether principles of comity or federalism bar "a claim under § 1983 which requires no scrutiny whatever of tax assessment practices, such as a facial attack on tax laws." 50 L.W. at 4019 n. 4. Schneider submits that such a claim is presented here. It is further submitted that exercise of federal jurisdiction in the instant case would entail no disrespect for state functions, nor any insensitivity to or undue interference with the legitimate interests and activities of the States. *See, McNary*, 50 L.W. at 4021, quoting *Younger* v. *Harris*, 402 U.S. 37, 44-45 (1971).

Similarly, as demonstrated at pp. 10-17 of the Petition, the exercise of federal jurisdiction in this case works no harm to the Tax Injunction Act, 28 U.S.C. § 1341.

IV. CONCLUSION.

In its Petition for Certiorari, Schneider argued that the newly emerged importance of State and local taxation serves to heighten the importance and substantiality of the question presented for review: Whether federal courts possess jurisdiction to enjoin patently unconstitutional state tax demands, as they are permitted to do under other statutes generally barring anticipatory relief in tax cases. The Respondents' failure to face the issues raised by the Petition demonstrates that the Petition should be granted. This Court's explicit reservation of the question in *McNary, supra,* only heightens the need for review in this case.

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